UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

SERCO MANAGEMENT SERVICES, INC.
d/b/a SERCO MANAGEMENT, INC.

Employer/Petitioner

and Case 12-RM-391

LOCAL 100-SEIU, AFL-CIO
Union[1]

and

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, AFFILIATED WITH NUHHCE,
AFSCME, AFL-CIO
Union[2]

DECISION AND DIRECTION OF ELECTION

Serco Management Services, Inc. d/b/a Serco Management, Inc. (Employer) provides weather observation services at Ft. Lauderdale International Airport in Florida where it employs seven employees. The Employer provides these services pursuant to a contract with the Federal Aviation Administration (FAA). On April 28, 2003, the Employer filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act. The Employer is seeking an election based upon competing claims by Local 100-SEIU, AFL-CIO (SEIU) and Professional Air Traffic Controllers Organization, affiliated with NUHHCE, AFSCME, AFL-CIO (PATCO) that they each represent a unit of all full-time and part-time weather observers employed by the Employer at Ft. Lauderdale International Airport.

[1] The name of Local 100-SEIU, AFL-CIO appears as stipulated to by the parties present at the hearing.
[2] The name of Professional Air Traffic Controllers Organization, affiliated with NUHHCE, AFSCME, AFL-CIO appears as stipulated to by the parties present at the hearing.

On April 7, 2003, PATCO filed an unfair labor practice charge in Case 12-CA-22933, alleging that since January 1, 2003, the Employer had refused to honor the economic terms of a collective-bargaining agreement between PATCO and IBEX Group, Inc. (IBEX). IBEX was the employer performing the weather observation services for the FAA in Ft. Lauderdale prior to the Employer. Based upon the pending charge, I blocked the processing of the petition. On May 29, 2003, I dismissed the charge in Case 12-CA-22933 because there was insufficient evidence to support the allegations, and the processing of the petition resumed. A hearing officer of the Board held a hearing, and the parties were given an opportunity to file briefs with me.[3]

As evidenced at the hearing and in the Employer's brief, there are two main issues in this case: (1) whether there is a question concerning representation under Section 9(c)(1)(B) of the Act warranting an election to determine whether the employees desire to be represented for collective-bargaining purposes by SEIU, PATCO, or neither; and (2) whether the senior weather observer should be included in the unit if an election is directed.

The Employer contends that an election is warranted because both SEIU and PATCO claim to represent the unit, and the Employer has a good faith reasonable uncertainty regarding the employees' majority support for SEIU or PATCO. PATCO, as evidenced by the record, argues that it is the legal representative of the employees, and the petition should be dismissed. The Employer, contrary to PATCO, also argues that the senior weather observer should be excluded from the unit because he is a statutory supervisor.[4] The unit the Employer contends is appropriate has six employees, while the unit

[3] The Employer is the only party that filed a brief.

[4] Although given an opportunity by the hearing officer, PATCO did not provide any evidence regarding the senior weather observer's supervisory status.

PATCO seeks includes seven employees. SEIU did not appear at the hearing or provide any evidence regarding the issues.[5]

I have considered the evidence and the arguments presented by the parties on each of the issues. As discussed below, I have concluded that a question concerning representation exists warranting an election to determine if the employees wish to be represented for collective-bargaining purposes by SEIU, PATCO, or neither. I have also concluded that the senior weather observer is not a statutory supervisor and should be included in the bargaining unit. Accordingly, I have directed an election in a unit that consists of seven employees.

To provide a context for my discussion of the issues, I will first provide the relevant factual background in this case. Then, I will present in detail the facts and reasoning that support each of my conclusions on the issues.

I. RELEVANT FACTUAL BACKGROUND

A. Employer Obtains FAA Weather Observation Contract

On November 25, 2002, pursuant to a bidding process, the FAA awarded the Employer the contract, effective January 1, 2003, for the performance of weather observation services at seven airports in the United States, including airports in Miami, Tampa, and Ft. Lauderdale, Florida. In order to obtain the contract, the Employer, whose headquarters are in Murfreesboro, Tennessee, began a bidding process. In April 2002, the Employer attended a conference held by the FAA for prospective bidders. Subsequently, the FAA posted a "screening information request" on the internet seeking bids, and the Employer responded by requesting that the FAA provide "Department of Labor wage determinations" which set forth the minimum wage an employer must pay to an employee at a

[5] On June 11, 2003, the parties were duly served with a Notice of Representation Hearing scheduling the hearing for June 19, 2003. Thereafter, SEIU's representative requested permission to participate in the hearing by telephone due to the birth of his child. I denied the request because SEIU failed to show good cause why the birth of a child several weeks prior to the hearing, without more, was sufficient to warrant permitting SEIU to appear telephonically at the hearing.

particular site per job category. The Employer also requested copies of any collective-bargaining agreements.

In response to the Employer's request, the FAA sent Jeffrey R. Yarris, the Employer's contract manager, a copy of a collective-bargaining agreement between then contractor IBEX and SEIU (IBEX/SEIU agreement) effective, by its terms, from April 1, 2000 to September 30, 2002, for a unit of weather observers at the Ft. Lauderdale International Airport. The Employer used the existing weather observer wage rates in the IBEX/SEIU agreement to develop its proposal to the FAA. However, the Employer increased the existing wage rates in its proposal by 3.3 percent to reflect a future increase in wages. After the FAA awarded the Employer the weather observation contract, the Employer undertook a pre-employment screening process for applicants, and hired seven weather observers.

B. SEIU and PATCO Overview

In or about late December 2002, David Capasso, SEIU's representative, called Yarris and requested negotiations concerning the bargaining unit employees at the Ft. Lauderdale facility. During that same period of time, Gerald R. Tuso, PATCO's representative, by telephone, also contacted the Employer and requested negotiations for the unit. Tuso also sent Yarris a copy of a collective-bargaining agreement between IBEX and PATCO covering a weather observation facility at the Hartsfield airport in Atlanta, Georgia, effective by its terms, from June 1, 2000 to May 31, 2005 (IBEX/PATCO agreement). The IBEX/PATCO agreement also contained an appendix, executed after the original agreement, specifying wage rates for the Ft. Lauderdale facility.

From October 1, 2002 through December 28, 2002, IBEX deducted union dues from some employees' paychecks and submitted those dues to PATCO. Those deductions were made pursuant to dues deduction authorization forms executed by the employees. However, the evidence reflects that

IBEX did not pay the employees the wages in the appendix during the duration of its FAA contract. Rather, IBEX continued to pay the employees the wages specified in the IBEX/SEIU agreement.

On or about January 1, 2003, the Employer commenced its weather observation services in Ft. Lauderdale. SEIU and PATCO each continued to assert that it represented the unit employees in Ft. Lauderdale. Given the competing claims by both unions and its uncertainty regarding the employees' majority support, the Employer suspended discussions with both unions and filed the petition.

II. QUESTION CONCERNING REPRESENTATION

Before addressing the specific issues presented in this case, I will briefly review the requirements for establishing a question concerning representation warranting an election based upon an employer's petition. I will next further describe the representation claims of SEIU and PATCO. I will then address the Employers' good faith reasonable uncertainty regarding the majority support of the employees for SEIU or PATCO.

A. Case Law

1. RM Petitions filed by Successor Employers

In NLRB v. Burns International Services, Inc., 406 U.S. 272 (1972), the Supreme Court, approving the Board's determination, stated that a "successor employer" has the obligation to recognize and bargain with the bargaining representative of the predecessor's employees. Burns, supra, at 291. The standard for a "successor employer" is an employer that 1) assumes the operations of another employer while maintaining substantial continuity with the predecessor's operations, and 2) hires a majority of the employee complement of the predecessor employer. Id. The Supreme Court also stated that the successor employer is generally not obligated to adopt the terms of the collective-bargaining agreement between the predecessor and the union. Id.

An incumbent union is entitled only to a rebuttable presumption of continuing majority status that will not bar an otherwise valid successor employer petition or other valid challenge to a union's majority status. MV Transportation, 337 NLRB No. 129, slip op. at 1 (2002), citing Southern Moldings, 219 NLRB 119 (1975). In MV Transportation, the Board overruled St. Elizabeth Manor, Inc., 329 NLRB 341 (1999), a case where the Board had established the "successor bar doctrine". MV Transportation, supra, at 1. Under the successor bar doctrine, a successor employer was required to bargain with an incumbent union for a reasonable period of time before any challenge to the union's majority status through a decertification petition, employer petition, or a rival union petition. St. Elizabeth Manor, supra, at 341.

In overruling St. Elizabeth Manor, the Board noted its obligation to strike a balance when conflicts arose between the two fundamental purposes of the Act: (1)"the protection and promotion of employee freedom of choice" and (2) "the preservation of the stability of bargaining relationships". MV Transportation, supra, at 3. The Board struck this balance in favor of employee free choice noting that the successor bar doctrine articulated in St. Elizabeth Manor in some circumstances would potentially prohibit the employees' ability to select a bargaining representative for several years. MV Transportation, supra, at 5. The Board in MV Transportation also disagreed with the notion that employees in a state of anxiety about the instability in a successorship situation were unable to make a decision regarding union representation. Rather, the Board noted that in such an environment, the employees might value their bargaining representative more fervently. Id. at 5.

2. Standard for RM Petitions

If an Employer files an RM petition, the Region will direct an election under Section 9(c)(1)(B) of the Act if the employer raises a question concerning representation by establishing that one or more unions has presented an affirmative claim to the employer that it represents a unit of its employees.

Windee's Metal Industries, 309 NLRB 1074 (1992); Amperex Electronic Corp., 109 NLRB 353, 354 (1954). In the case of an incumbent union, the Employer must also demonstrate "a good faith reasonable uncertainty" regarding the employees' majority support for the incumbent union. Levitz Furniture Company of the Pacific, Inc., 333 NLRB 717, 727 (2001). In making this determination, it is the employer's good faith uncertainty that is in question not a union's actual majority status. Moreover, the standard applies to any incumbent, whether certified or not. See Fall River Dyeing & Finishing Corp, 406 U.S. 27, 41 (1987).

Historically, the Board applied the same standard for processing RM petitions as for the unilateral withdrawal of recognition by an employer. That test was, an employer's good faith reasonable doubt, based upon objective evidence, of continued majority status. Texas Petrochemicals Corp., 296 NLRB 1057 (1989**)**. In Allentown Mack Sales & Service, Inc., 522 U.S. 359 (1998), the Supreme Court determined that the standard must be interpreted as " reasonable uncertainty" rather than "doubt or disbelief ".[6] Subsequently, in Levitz, the Board decided that employers would be required to show actual loss of majority support in order to unilaterally withdraw recognition from a union. Levitz, supra, at 725. However, for RM petitions, the Board chose to adopt the "good faith reasonable uncertainty" standard thereby encouraging employee free choice through Board elections. The Board also noted that this standard for RM petitions would promote stable bargaining relationships because the union's representation of employees would continue while the petition was processed. Id. at 727.

An employer may establish "good faith reasonable uncertainty" of employee loss of majority support through evidence of antiunion petitions, firsthand statements by employees expressing union opposition and employee expressions of dissatisfaction with the union's performance as the bargaining representative. Levitz, supra, at 728. See also Allentown Mack, supra, at 359. The Board, however,

[6] The Board had often used the terms doubt and disbelief interchangeably.

has stated that, "the regional offices should take into account all of the evidence which, viewed in its entirety, might establish uncertainty as to the union's continuing majority status." Id. at 728. Thus, evidence of "good faith reasonable uncertainty" is not limited to the types of evidence specifically described in Levitz or Allentown Mack.

B. SEIU'S Claim of Representation

As stated above, the IBEX/SEIU agreement for Ft. Lauderdale was effective, by its terms, from April 1, 2000 to September 30, 2002. In addition to the agreement covering the Ft. Lauderdale unit, SEIU had existing collective-bargaining agreements with IBEX for weather observation employees at airports in Birmingham, Alabama, Miami, Florida, and Tampa, Florida.

From late November to December 2002, Capasso, SEIU's representative, and Yarris, the Employer's contract manager, had various telephone conversations and exchanged e-mails regarding the Ft. Lauderdale facility. Capasso, however, was not too knowledgeable about the Ft. Lauderdale facility because he had only recently joined SEIU as a representative for the weather observation facilities. However, in late December 2002, Capasso informed Yarris that SEIU represented the Ft. Lauderdale unit. Capasso asked Yarris if the Employer intended to negotiate with SEIU, and Yarris responded "o.k.", with the intention of general discussions regarding negotiations. On January 6, 2003, Capasso sent Yarris an e-mail seeking to clarify an issue with an employee and reiterating SEIU's desire for uniformity in all the collective-bargaining agreements for all the facilities.

Sometime between April 10 and 17, 2003, Capasso called Yarris and (1) re-affirmed SEIU's claim to represent the Ft. Lauderdale unit; and (2) informed Yarris that the employees had "voted in" SEIU as their bargaining representative.[7] Although Capasso was not employed by SEIU when the IBEX/SEIU agreement expired, Capasso also told Yarris that IBEX did not give the Union notice to

[7] The Region does not have any record of SEIU being certified by the Board as representative of the unit.

terminate or re-negotiate the agreement.[8] On April 28, 2003, per the Employer's request, Capasso sent Yarris a letter, by facsimile, asserting representational rights to the Miami, Ft. Lauderdale, and Birmingham, Alabama units, and setting a date for negotiations.

C. PATCO's Claim of Representation

As stated above, the IBEX/PATCO agreement covers the weather observation employees at the Hartsfield airport in Atlanta, Georgia, and the agreement is effective, by its terms, from June 1, 2000 to May 31, 2005.[9] The appendix to the agreement, executed by the parties on August 7, 2002, provides wages for the Ft. Lauderdale facility, but does not contain a specific recognition clause for the Ft. Lauderdale unit.[10] There is inconclusive evidence that the IBEX/PATCO agreement was implemented during the term of IBEX's contract with the FAA, although in February 2003, the employees did receive a one-time payment of back wages under the IBEX/PATCO agreement. In addition, IBEX did remit union dues to PATCO, as authorized by its employees. It should be noted that IBEX and PATCO also had collective-bargaining agreements covering weather observation employees at airports in Las Vegas, Nevada, and Oakland, California, as well as in Atlanta, Georgia.

In protest of the FAA's contract award to the Employer, IBEX representatives were reluctant to provide Employer contract manager Yarris with any information about SEIU or PATCO. However, sometime in November or December 2002, an IBEX employee provided Yarris with a copy of the IBEX/PATCO agreement and informed him that IBEX was not paying the wages set forth in the agreement. In December 2002, PATCO representative Tuso called Yarris and confirmed that the

[8] The agreement automatically was to renew itself unless either party provided notice requesting re-negotiations 60 days prior to the expiration or renewal date of the contract. None of the parties contend that the expired IBEX/SEIU contract would bar an election in this case. Rather, SEIU consistently approached the Employer with the intention of negotiating a new collective-bargaining agreement.

[9] Article 27 of the agreement provides that IBEX voluntarily agrees to recognize future bargaining units after notification of majority support of the employees in those units, and the agreement shall automatically cover those units.

[10] None of the parties contends that the IBEX/PATCO agreement is a bar to an election. Assuming arguendo said contention was made, with the exception of dues deductions, the agreement was never implemented at the Ft. Lauderdale facility during the term of IBEX's contract with the FAA. Under the circumstances herein, the agreement would not bar an election.

employees were not paid the wages in the agreement. Tuso also sent Yarris another copy of the IBEX/PATCO agreement. In late December 2002, PATCO sent the Employer a letter requesting negotiations for the Ft. Lauderdale facility. The Employer agreed, as it had done with SEIU, to discuss negotiations with PATCO.

Starting in late November 2002, Yarris also attempted to obtain information from the FAA concerning PATCO's claim to represent the unit. Under its contract with the Employer, the FAA was required to provide all copies of collective-bargaining agreements to the Employer by January 1, 2003. Although Yarris contacted the FAA several times concerning the IBEX/PATCO agreement, the FAA did not have a copy or record of the agreement.[11]

On January 2, 2003, Tuso sent Yarris a letter stating that PATCO was the "certified representative" for the Ft. Lauderdale and Las Vegas, Nevada facilities and formally requesting negotiations for both units.[12] On January 5, 2003, the Employer held a dinner for its newly hired employees. During the dinner, Yarris told the employees that it was not honoring the IBEX/PATCO agreement. A shop steward, who was present at the dinner, told the Employer that the employees had signed union authorization cards for PATCO. However, the manner in which the cards were collected by PATCO appeared suspicious to the Employer,[13] and it was not clear to the Employer whether the shop steward represented SEIU or PATCO.

D. The Employer's Response to Claims of Representation by SEIU and PATCO

On January 21, 2003, the Employer sent separate letters to the unions offering to negotiate. PATCO immediately responded to the letter, and the Employer agreed to recognize and bargain with

[11] Tuso contends that an FAA backlog and change in routing FAA contracts caused FAA's failure to provide the Employer with the agreement and IBEX's failure to pay the employees the wages in the agreement. However, there is no evidence to suggest that the Employer was aware of these possible explanations prior to its filing of the petition.

[12] Region 12 has no record of PATCO being certified as the representative of the Ft. Lauderdale unit.

[13] It should be noted that the Board normally refuses to receive evidence in representation hearings that signatures on cards were unlawfully obtained, but such issues may be litigated in an unfair labor practice proceeding. Dale's Super Valu, 181 NLRB 698 (1970). No such unfair labor practice charge has been filed with the Region, nor does the record in the current proceeding include any argument that if an election is directed, PATCO should not be on the ballot.

PATCO. The Employer and PATCO also agreed to bargain with respect to the Las Vegas, Nevada and Oakland, California facilities. Sometime between January and March 2003, the Employer sent PATCO a draft proposal for the Ft. Lauderdale unit and agreed to a negotiation meeting. On March 26, 2003, Yarris and Tuso met at a hotel in Murfreesboro, Tennessee and negotiated the collective-bargaining agreement for the Las Vegas, Nevada and Oakland, California units. With respect to Ft. Lauderdale, the Employer and PATCO were unable to reach an agreement.

On April 7, 2003, after failing to reach a collective-bargaining agreement with the Employer for the Ft. Lauderdale unit, PATCO filed Case 12-CA-22933. As stated above, on April 28, 2003, the Employer also received a letter from SEIU claiming representation rights and seeking to negotiate a new collective-bargaining agreement. At that point, Yarris was unable to find any evidence that either SEIU or PATCO had been decertified at the Ft. Lauderdale facility.[14] On April 29, 2003, Yarris sent both unions letters canceling negotiations and stating that the Employer filed the RM petition.

E. Analysis

At the outset, I find that the Employer meets the definition of a successor employer with an obligation to recognize and bargain with the bargaining representative of the predecessor's employees. NLRB v. Burns International Services, Inc., 406 U.S. 272 (1972). As such, an incumbent union is entitled only to a rebuttable presumption of majority status that will not bar a valid employer petition. MV Transportation, 337 NLRB No. 129, slip op at 1 (2002). I also find that the Employer has established that a question concerning representation exists warranting an election to determine whether the employees desire representation for collective-bargaining purposes by SEIU, PATCO, or neither. The Employer has shown that both SEIU and PATCO have made affirmative claims of representation for the Ft. Lauderdale unit and that the Employer has a good faith reasonable uncertainty regarding the employees' majority support for SEIU or PATCO.

[14] The Region does not have a record of either union being decertified as the representative of the unit.

1. Affirmative Claims Of Representation

As stated above, I find that SEIU and PATCO have made affirmative claims of representation as required by Section 9(c)(1)(B) of the Act. With respect to SEIU, Capasso, on several occasions told Yarris that SEIU represented the unit and sought collective-bargaining negotiations. Capasso also provided the Employer with a copy of the expired IBEX/SEIU agreement, and advised Yarris that IBEX had not notified SEIU of an intent to terminate or renegotiate the agreement. Although the agreement expired, IBEX continued to pay employees the wages in the IBEX/SEIU agreement. Thus, SEIU, based upon its expired collective-bargaining agreement, claimed representation rights and requested negotiations for the Ft. Lauderdale unit.

Similarly, PATCO also claimed to represent the unit and requested negotiations based upon an existing collective-bargaining agreement covering the same unit of employees. The employees were not paid the wages in the IBEX/PATCO agreement during the contract term between IBEX and the FAA, and the FAA apparently did not have a copy of the agreement. However, IBEX remitted dues to PATCO pursuant to dues deduction authorization forms executed by some employees, and in February 2003, the employees received a one-time back payment of the wages in the agreement. Thus, PATCO made an affirmative claim of representation based upon its contention of an existing collective-bargaining agreement.[15]

Accordingly, the Employer has established that SEIU and PATCO presented affirmative claims of representation as required by Section 9(c)(1)(B) of the Act. Windee's Metal Industries, 309 NLRB 1074 (1992); Amperex Electronic, 109 NLRB 353, 354 (1954).

[15] As previously stated, I am not finding that the IBEX/PATCO agreement is a bar to the election or that the Employer is otherwise bound to the agreement. However, the existence of the agreement establishes a basis for the Employer's contention that PATCO made an affirmative claim of representation.

2. Good Faith Reasonable Uncertainty

I also find that the Employer has established a good faith reasonable uncertainty of the employees' majority support for SEIU or PATCO.

Although this case presents an unusual set of circumstances, the evidence, viewed in its entirety, establishes good faith reasonable uncertainty regarding the employees' majority support for SEIU or PATCO. Levitz, 333 NLRB at 717. First of all, the Employer did not find any record that a petition was filed seeking to decertify SEIU or PATCO. Secondly, the employees executed dues deduction authorization forms for PATCO, and those dues were remitted to PATCO. See Allentown Mack, 522 U.S. at 369 (authorization of dues deduction forms by the employees is akin to an "expression of employee dissatisfaction with the union's performance" that has been used to find "good faith reasonable uncertainty"). Cf. Henry Bierce Co., 328 NLRB 646, (1999) (where the Board found that failure of some employees to authorize the deduction of union dues was insufficient to establish doubt of majority support). Finally, although the Ft. Lauderdale facility had a shop steward, the Employer was unable to determine if the shop steward represented SEIU, PATCO, or both. Under these circumstances, an election would promote employee free choice by ascertaining whether the employees desire representation by either union.

Accordingly, I find that a question concerning representation exists and that an election is warranted to determine if the employees wish to be represented by SEIU, PATCO, or neither.

III. Status of Senior Weather Observer

A. Case Law

Before examining the specific duties and authority of the senior weather observer, I will briefly review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, lay off,

recall, promote, discharge, assign, reward, or discipline other employees or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Thus, employees are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 specific criteria listed; (2) their "exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment"; and (3) their authority is held in the "interest of the employer." Kentucky River, 121 S. Ct.1861, 1867 (2000); Harborside HealthCare, Inc., 330 NLRB 1334 (2000); Ohio Power Co. v. NLRB, 176 F. 2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949).

The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act, and because Congress' intent to include professional employees under Section 2(12) would be nullified. NLRB v. Yeshiva University, 444 U.S. 672 (1980); Vencor Hospital-Los Angeles, 328 NLRB 1136, 1138 (1999). The legislative history of Section 2(11) also reflects that Congress intended the definition of a supervisor to apply to those employees with "genuine management prerogatives". S. Rep. No. 198, 80th Cong., 1st Sess. 19 (1947), 1 NLRB Legis. History of LMRA 1947, pp. 410, 425 (1948). The exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not require a finding that an employee is a supervisor within the meaning of the Act. Somerset Welding & Steel, 291 NLRB 913 (1988).

The burden of proving supervisory status lies with the party asserting such status exists. Kentucky River, supra, at 1866; Michigan Masonic Home, 332 NLRB No. 150, slip op. at 1 (2000). Lack of evidence is construed against the party asserting supervisory status. Michigan Masonic Home, supra, at 1. Mere inferences or conclusionary statements without detailed, specific evidence of

independent judgment are insufficient to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991).

Designation of an individual as a supervisor by title in a job description or other documents is insufficient to confer supervisory status. Western Union Telegraph Company, 242 NLRB 825, 826 (1979). Moreover, the employer's directive or a job description setting forth supervisory authority also does not conclusively establish supervisory status. Bakersfied Californian, 316 NLRB 1211 (1995); Connecticut Light & Power Co., 121 NLRB 768, 770 (1958). On the other hand, possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status even if this authority has not yet been exercised. See, e.g. Fred Meyer Alaska, 334 NLRB 642, fn 8 (2001); Pepsi-Cola Co., 327 NLRB 1062, 1063 (1999). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See Michigan Masonic Home, supra, at 3. Thus, the question is whether the evidence demonstrates that the individual actually possesses any of the powers enumerated in Section 2(11). Western Union Telegraph Company, supra, at 826; North Miami Convalescent Home, 224 NLRB 1271 (1976).

As an initial matter, the record does not reflect that the senior weather observer is involved in the lay off, recall, promotion, discharge, or reward of employees, or adjusting their grievances, or effectively recommending such actions. Thus, after providing an overview of the senior weather observer position, I will discuss the senior weather observer's role in scheduling, hiring, disciplining and responsibly directing employees. I will then discuss the senior weather observer's role in training and evaluating employees which are not specifically enumerated criteria under the Act for establishing supervisory authority. Finally, I will discuss the lack of on-site supervision, the senior weather observer's higher wages, job title, and maintenance of office supplies and communications with the FAA and NWS, all of which are secondary indicia of supervisory status.

B. Overview of Senior Weather Observer Position

There are currently seven weather observers, including the senior weather observer, who perform weather observation duties 24 hours a day at the Ft. Lauderdale facility.[16] Each weather observer is alone when he performs his work. The FAA requires that all weather observers must be certified by the NWS to perform their work. The weather observers, who all use the same office, type an hourly "METAR" report into a computer system. METAR is the code formulated by the FAA and contained in a book prepared by the FAA called the "7900". If certain weather conditions are met, such as a thunderstorm, the weather observers may be required to provide reports more frequently, for example, every three minutes. These reports are used by the National Weather Service (NWS), Flight Service and the Airport Tower. All of the weather observers are experienced and do not need direction in performing their work.

Under the FAA's contract, the Employer must designate an on-site weather observation employee, with a minimum of one year's experience, as a "supervisor". The supervisor's job description in the FAA contract states that the "supervisor" is responsible for (1) promulgating instructions and other information to employees; (2) developing quality control techniques and maintaining quality control procedures; (3) preparing reports and inventories required by the contract; (4) filing revisions; (5) providing training; and (6) performing all other supervisory/managerial duties required for the successful accomplishment of the contract.

As indicated above, in practice, all the weather observers perform their work, without on-site supervision during their shifts. Although the senior weather observer has additional responsibilities, he spends 90 percent of his time performing the same functions as the regular weather observers. David

[16] Three weather observers, including the senior weather observer, are full-time employees. Four weather observers are part-time employees, including one weather observer who is on a leave of absence.

Yarris, contract manager, supervises all of the weather observers, including the senior weather observer.

Both the PATCO and SEIU collective-bargaining agreements with IBEX included the senior weather observer position in the unit.

C. The Senior Weather Observer Does Not Use Independent Judgment To Assign Work to Employees (Scheduling and Payroll)

The senior weather observer has a role in scheduling and payroll. Regarding scheduling, the FAA provides that the weather observers cannot work more than a 10-hour shift. The senior weather observer prepares a schedule the last week of every month and must submit the schedule to the contract manager for approval. The senior weather observer always works 7:00 a.m. to 3:00 p.m., and the schedule rarely changes with respect to the other employees. With respect to changes in the schedule, the senior weather observer can make last minute adjustments to the schedule without prior approval from the office.[17] In addition, he can transfer employees to different shifts on a short-term basis without approval.[18] Although the Employer argues in its brief that the senior weather observer can approve overtime daily, the senior weather observer testified that he must seek approval from the office before any employee can incur overtime.[19] It is not clear whether there is any formal procedure for requesting vacations, but the senior weather observer testified that he tries "to cover" employees who seek vacation time, and it is generally worked out among the employees.[20]

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[17] The senior weather observer in Miami testified that he adjusted the grievance of an employee with a shop steward involving the employee's schedule. However, there is no evidence concerning how this "grievance" was adjusted, the specific native of the senior weather observer's involvement, or that the senior weather observer in Ft. Lauderdale has ever adjusted grievances regarding schedules.

[18] Contrary to the Employer's contention, there is no evidence that the senior weather observer has effectively recommended any transfers of employees to other facilities.

[19] Although the senior weather observer in Miami testified that he can authorize overtime without approval, this is not the case in the Ft. Lauderdale facility.

[20] The senior weather observer in Miami testified that he grants vacation and approves sick leave, but the record does not reflect the specifics of said authority nor that the senior weather observer in Ft. Lauderdale actually grants vacation or approves sick leave.

Regarding payroll, the senior weather observer collects time and attendance sheets, including his own, and submits them to the office. Although the senior weather observer testified that he "approves" employees' time, this amounts to correcting errors in time and attendance sheets. The employee who makes the error also reviews the corrections made by the senior weather observer. All of the employees receive their pay through direct deposit into their bank accounts, but the senior weather observer does place the pay stubs in every employee's in-box.

I find that the authority of the senior weather observer to prepare regular monthly schedules, make adjustments to the schedule, and accommodate vacation schedules is insufficient to establish supervisory status. The schedule generally does not vary from month to month. Thus, the role of the senior weather observer in preparing schedules may require the use of some independent judgment, but it is largely routine. See S.D. I. Operating Partners, L.P., 321 NLRB 111 (1996). To the extent the senior weather observer may temporarily assign weather observers to different shifts to avoid incurring overtime, such assignments, made to equalize employee's workload and done on a rotational or other similar basis, are routine assignments. King Broadcasting Co., 329 NLRB 378 (1999); Ohio Masonic Home, 295 NLRB 390, 395 (1989); Cf. NLRB v. Quinnipiac College, 256 F. 3d 68, 75 (2nd Cir. 2001) (shift supervisors who regularly and independently assessed non-routine situations such as fire alarms and deployed staff to cover those situations were statutory supervisors). In this regard, it is not clear what criteria the senior weather observer uses to decide who will work a particular shift. Furthermore, the record does not reflect that there is any difference in skill level among the employees warranting an assignment based upon the employee's skill level. Moreover, the senior weather observer lacks the authority to grant overtime. S.D.I., supra, at 111. To the extent the senior weather observer occasionally adjusts schedules due to vacations, this is insufficient to confer supervisory authority. General Security Services Corporation, 326 NLRB 312 (1998).

I also find that the senior weather observer's role in collecting and reviewing payroll is insufficient to establish supervisory authority. The Board has held that the signing of timecards on a routine basis is insufficient to confer supervisory status. Electrical Specialties, Inc., 323 NLRB 705, 707 (1997). With respect to correcting time and attendance sheets, the record does not reflect (1) how often the senior weather observer makes these corrections; (2) that the corrections are anything other than routine; or (3) that any disciplinary action is taken against an employee for failing to correctly state their time based upon the senior weather observer's corrections. Moreover, the fact that the FAA precludes employees from working more than 10-hour shifts and that the schedule rarely changes tends to demonstrate that the senior weather observer's scheduling and payroll functions are routine.

Based on the foregoing, I find that the senior weather observer does not exercise sufficient independent judgment in assigning work to employees or in performing payroll functions to establish supervisory status.

D. The Senior Weather Observer Does Not Hire Employees or Effectively Recommend Hiring of Employees

The senior weather observer has provided recommendations to the Employer regarding applicants for employment. When the Employer assumed the Ft. Lauderdale operations, Yarris hired an existing weather observer as the senior weather observer. At that time, it appears that the senior weather observer gave some verbal opinions and/or recommendations to the Employer concerning hiring, primarily related to former IBEX employees.

Although the senior weather observer testified that he "interviewed" an applicant, this was a former IBEX fill-in employee. The senior weather observer told Yarris that "he thought highly" of the applicant, and the Employer hired the individual. In another instance, the senior weather observer obtained a resume from the Employer for an applicant, and the senior weather observer "passed along to the office" that he thought the applicant was the best man for the job. However, the Employer failed

to hire a part-time weather observer employed by IBEX, in spite of a good recommendation by the senior weather observer. Although the senior weather observer also made a "few calls", it is not clear what took place during, or subsequent to, those telephone conversations.

I find that the record fails to establish that the senior weather observer hires employees or effectively recommends the hiring of employees. The mere involvement in interviewing and/or hiring applicants, when others are involved in that process, is insufficient to support a finding of supervisory status. Legal Aid Society of Alameda County, 324 NLRB 796, 797 (1997). Moreover, mere conclusory statements that the senior weather observer passed along recommendations to the Employer, without more, are also insufficient to demonstrate that the senior weather observer effectively recommends the hiring of employees. In this regard, the Employer admits in its brief that the contract manager conducted a second interview of all the applicants prior to their hiring. The senior weather observer also testified that he did not ultimately make the decision to hire the applicants. Moreover, the fact that the senior weather observer's recommendation to hire an applicant was not heeded by the Employer negates a finding that he has the authority to effectively recommend the hiring of employees.

Accordingly, I find that the senior weather observer does not hire employees, or effectively recommend their hiring, using sufficient independent judgment to confer supervisory status.

E. The Senior Weather Observer Does Not Discipline Employees or Effectively Recommend Discipline of Employees

As described more fully below, the senior weather observer is involved in reviewing the METAR code and brings any errors in coding to the attention of employees. However, there is no

evidence that the senior weather observer has ever disciplined an employee or effectively recommended discipline.[21]

With respect to coding deficiencies, the senior weather observer merely informs the weather observer of the mistake, and the employee corrects the error. In this regard, the senior weather observer testified that improper coding is a minor issue, occurs infrequently, and there are no repercussions from the FAA or NWS for improper coding. In addition, although the senior weather observer testified that he is responsible for assuring that employees are "reliable, dependable, show up for work, and follow the schedule," there is no evidence that he has the authority to discipline employees for failing to do so, nor that he has done so. Although the Employer argues that the senior weather observer is "empowered and authorized to discipline employees under his supervision", the senior weather observer testified that there are no disciplinary problems at the Ft. Lauderdale facility and that he has not written up any employees. Moreover, the senior weather observer testified that if a disciplinary problem occurred, he would "write it" and send it to management. The senior weather observer, in an isolated incident, did recommend to the Employer that he believed a former IBEX fill-in or relief employee was not needed, and Yarris "took care of it". However, contrary to the Employer's contention, the record does not reflect that the senior weather observer recommended "the termination" and provided substantial input into the decision. Rather, the senior weather observer testified that the observer in question was not fired, and the record does not reflect how the senior weather observer's recommendation factored into the Employer's ultimate decision not to use the fill-in or relief employee.

[21] The senior weather observer in Miami, who has been a senior weather observer in Miami since 1988, testified that he issued one letter of reprimand to an employee approximately one and a half years ago, which was prior to the Employer's assumption of operations. Moreover, the record does not reflect that the letter of reprimand affected the employee's job or that the senior weather observer in Ft. Lauderdale has ever issued a letter of reprimand.

I find that the senior weather observer's duties in bringing coding deficiencies to the attention of other employees is insufficient to establish supervisory status. The Board has found that oral reports that merely inform the employee of a failure to follow the Employer's policies or procedures but do not affect an employee's job are insufficient to confer supervisory status. General Security Services, 326 NLRB at 312; S.D.I., 321 NLRB at 112. The record fails to establish that the senior weather observer's infrequent and minor coding corrections lead to discipline or impact the employee's employment status in any way. Moreover, the senior weather observer's testimony that he would "write up" an employee in the event of a disciplinary problem and that in an isolated instance he recommended that an employee was not needed, are likewise insufficient to support a finding of supervisory authority for the reasons discussed above.

Accordingly, I find that the senior weather observer does not have the authority to independently impose, or effectively recommend, discipline, so as to establish supervisory status.

F. The Senior Weather Observer Does Not Responsibly Direct Employees Using Independent Judgment

The senior weather observer is responsible for providing the employees with FAA and NWS instructions, requirements and revisions to those documents. As noted above, the senior weather observer also reviews the METAR code and corrects coding errors.

As stated above, the senior weather observer's job description includes "promulgating instructions and information to employees". The record reveals that the senior weather observer interacts with each weather observer for two hours per month to perform training. Otherwise, the weather observers, including the senior weather observer, perform their work independently of each other. All of the weather observers are certified by the NWS and are experienced in weather observation.

Although the senior weather observer states that he has the overall authority for determining work procedures and "autonomously manages the station", the FAA and NWS provide detailed manuals and directives regarding weather observation. The weather observers must follow the "7900" provided by the FAA to input the code into the computer system regarding weather phenomena, and only the FAA can change or revise the "7900". In accordance with his job description to promulgate instructions and information, the senior weather observer makes sure that FAA and NWS manuals and directives, including revisions, are kept in the office. The senior weather observer advises other weather observers regarding any new revisions, which are initialed by the employee.

According to the job description, the senior weather observer is also responsible for quality control techniques and maintaining quality control procedures. The senior weather observer testified that "quality control" involves ensuring that the weather observers are reporting and coding properly. The senior weather observer reviews the code every day at home from his computer. Although the senior weather observer states that he makes weather observers aware of deficiencies in observations, the record reflects that all of the weather observers are very experienced and know how to perform their jobs. Improper coding results primarily from experienced weather observers who are used to the "moderate cue", the code in place prior to METAR code. If a weather observer is not coding per the "7900", the senior weather observer informs the weather observer, and as he testified, "we correct it". However, there have been only a few inconsistencies in coding.

I find that the senior weather observer's role in disseminating information to employees developed by the FAA and NWS or reviewing the coding process is insufficient to establish responsible direction of employees using independent judgment. In Kentucky River, the Supreme Court took issue with the Board's categorical exclusion of those using ordinary technical and professional judgment in directing those less skilled from the definition of a supervisor and with the

fact that the Board only seemed to apply the "independent judgment" prong to the "responsibly direct" factor, as opposed to all 12 factors. The Court reasoned that this per se approach was inconsistent with the language of Section 2(11) and the Court's Decision in NLRB v. Health Care and Retirement Corp., 511 U.S. 571 (1994), wherein the Court ruled that the test for supervisory status under the Act applies the same to professionals as to other employees. The Court requested that the Board perform a factual analysis rather than automatically exclude individuals from the definition of a statutory supervisor, taking into consideration the degree of independent judgment and the amount of employer constraints on the individual.

However, the Court recognized it is within the Board's discretion to determine the degree of independent judgment required for supervisory status. Kentucky River, 121 S. Ct. at 1867. The Court also agreed with the Board that an individual might not be held a supervisor if the employer limits the degree of independent judgment by, for example, detailed orders. Id., citing Chevron Shipping Co., 317 NLRB at 381. In addition, while the Court explicitly refrained from interpreting the phrase "responsibly to direct", the Court suggested that the Board could interpret this phrase by "distinguishing between employees who direct the manner of others' performance of discrete tasks from employees who direct other employees as [Section] 2(11) requires." Kentucky River, supra, at 1871, citing Providence Hospital, 320 NLRB 717, 729 (1996).

With respect to providing weather observers with FAA and NWS directives, the senior weather observer appears to be merely the Employer's conduit for disseminating and maintaining the information. The senior weather observer does not prepare the information nor does the record reflect that he enforces the policies promulgated by the FAA or NWS. Moreover, as noted above, the record fails to establish that the senior weather observer's direction in correcting minor and infrequent coding errors requires independent judgment or is other than routine. See Loyalhanna Health Care Associates,

332 NLRB 933 (2000); Northern Montana Health Care Center, 324 NLRB 752, 753 (1997). The fact that the senior weather observer's direction is in accordance with detailed procedures set forth by the FAA and NWS, further demonstrates that the use of independent judgment is not required. Kentucky River, supra, at 1867; Chevron Shipping Co., 317 NLRB at 381; Express Messenger Systems, 301 NLRB 651, 654 (1991); Bay Area-Los Angeles Express, Inc., 275 NLRB 1063, 1077 (1985).

Based on the foregoing, I find that the senior weather observer does not responsibly direct employees using sufficient independent judgment to establish supervisory status.

G. The Senior Weather Observer's Role in Training and Evaluating Employees Is Insufficient to Establish Supervisory Status

Pursuant to the FAA's job description, the senior weather observer is responsible for providing training to employees. In so doing, the senior weather observer prepares some training materials, conducts training, and prepares a training log and other reports.

The senior weather observer prepares training materials based upon existing FAA and NWS procedures and spends two hours a month training each weather observer on an individual basis. In addition, per the FAA's requirements, the senior weather observer maintains a training log for each employee. Moreover, the FAA requires that all of the employees must be evaluated quarterly, and reports are generated for each employee. In fact, a weather observer must even evaluate the senior weather observer every quarter. It is not clear what the training log or evaluation contains or if the contract manager reviews these documents prior to their submission to the FAA.[22] The senior weather observer also generates a monthly SAP report. SAP stands for self-assurance program, and the report contains anything of significance that occurred during the month in the station. On one occasion the senior weather observer informed the project manager that another observer did a good job under adverse circumstances and noted the observer's performance on the evaluation and SAP reports.

[22] The senior weather observer in Miami testified that he performs "over the shoulder" evaluations and provides remedial training to employees, but this evidence alone, without more, is insufficient to establish supervisory authority.

I find that the senior weather observer's authority to train or evaluate employees is insufficient to establish supervisory authority. The authority to train or evaluate employees is not one of the enumerated criteria for determining supervisory status. The Board has held that supervisory status is not conferred by training and monitoring unless the individual selects employees to perform work based upon judgment of an employee's skills obtained from observations of their work. Byers Engineering Corp., 324 NLRB 740 (1997). With respect to evaluations, unless the evaluations are directly linked to a wage increase, or in some other way affect the employee's employment status, such authority is not deemed supervisory authority. Hausner Hard-Chrome of KY, Inc., 326 NLRB 426, 427 (1998). Moreover, the documenting of events incidental to work does not require the use of independent judgment. Telemundo De Puerto Rico v. NLRB, 321 NLRB 916 (1996), enf'd, at 113 F.3d 270 (1st Cir. 1997).

The senior weather observer trains employees, prepares evaluations for employees, and generates reports. However, the record does not reflect that the senior weather observer uses any observations gained from said training or monitoring to assign employees' work. Although the senior weather observer may use some independent judgment to prepare training materials, the materials are in accordance with FAA and NWS directives. Moreover, although the senior weather observer prepares an evaluation, the record fails to establish that these evaluations affect an employee's employment status. Contrary to the Employer's argument, the record does not reflect that the senior weather observer has provided formal recognition for the outstanding performance of employees. Rather, the senior weather observer's comments to the contract manager and notations on reports that a weather observer did a good job, without more, is insufficient to establish supervisory authority. Moreover, the record does not reflect that the senior weather observer has the authority to grant raises to weather observers, determine the amount of any raises, or promote weather observers based upon

these observations or evaluations. Finally, the fact that the senior weather observer is himself evaluated by another weather observer clearly negates any finding that these evaluations affect an employee's job. With respect to the SAP report, it is not clear if any other employees have input concerning the SAP report or that the document affects an employee's job. Rather, it appears that the FAA requires these reports as a routine procedure.

Accordingly, I find that the senior weather observer's role in training and evaluating employees, and preparing reports is insufficient to establish supervisory status.

H. Secondary Indicia of Supervisory Status

During the hearing, the Employer presented evidence that the senior weather observer is the only person on-site with a supervisor's title, receives higher pay than other weather observers, maintains office supplies, and communicates with the FAA and NWS.

Although the senior weather observer testified that he is the only on-site supervisor, all of the weather observers perform their work individually, without any on-site supervision during a shift. In addition, the senior weather observer is paid slightly more per hour than the other weather observers, but all of the employees receive the same benefits. Although the senior weather observer is called "a supervisor" in the Employer's contract with the FAA, the senior weather observer spends his day performing hands-on weather observation duties. Pursuant to the job description requiring the senior weather observer to maintain inventory, the senior weather observer maintains office supplies at the Employer's facility. The senior weather observer has also spoken to the FAA and NWS officials on a couple of occasions regarding equipment or certification issues.

At the outset, it should be noted that secondary indicia of supervisory status are not determinative of supervisory authority under the Act. General Security Services, 326 NLRB at 312; Juniper Industries, Inc., 311 NLRB 109, 110 (1993). With respect to on-site supervision, the Board

has rejected arguments that there must be a supervisor in every workplace. VIP Health Services, Inc., 164 F.3d 644 (D.C. Cir. 1999). Moreover, the absence of another employee with authority under Section 2(11) of the Act, does not automatically confer supervisory status upon the highest ranking employee at the jobsite. VIP Heath Services, supra, at 2273; See also NLRB v. KDFW-TV, Inc., 790 F. 2d 1273, 1279 (5th Cir. 1986). In addition, given that the senior weather observer performs the same work as the other weather observers, his slightly higher wages for performing additional routine tasks is insufficient to demonstrate supervisory status. Cf. Service Employees International Union, 322 NLRB 402, 404-405 (1996) (employees who determined particular assignments for employees, disciplined, hired, and received higher wages for their increased technical skills found statutory supervisors).

Although the FAA's contract with the Employer calls the senior weather observer "a supervisor", supervisory status is determined by job duties rather than title or classification. MJ Metal Products, Inc., 325 NLRB 240, 241 (1997); John N. Hansen Co., 293 NLRB 63, 64 (1989) (title of warehouse supervisor insufficient to confer supervisory status when warehouse supervisor was merely a conduit for relaying management instructions regarding routine tasks); Winco Petroleum Co., 241 NLRB 1118, 1121-1122 (1979) (title or theoretical power to perform supervisory function not determinative in the absence of actual supervisory status).

With respect to maintaining office supplies, there is no evidence that the senior weather observer is responsible for paying for these supplies. Nor is the fact that the senior weather observer has spoken to the FAA or NWS sufficient to establish supervisory status. In this regard, the record does not reflect whether or not the other weather observation employees, who work individual shifts, have ever had contacts with the FAA or NWS or are prohibited from such by the Employer.

Accordingly, I find that the above-described secondary indicia of supervisory status are insufficient to establish supervisory authority.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

A. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

B. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.[23]

C. The Petitioner/Employer claims that two labor organizations have made claims to represent certain employees of the Employer.[24]

D. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) and Section 2(6) and 2(7) of the Act.

E. The following employees of the Employer constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time weather observers and senior weather observers employed by the Employer at Ft. Lauderdale International Airport.
Excluded: All other employees, including confidential employees, guards and supervisors as defined by the Act.

[23] The Employer, with headquarters in Murfreesboro, Tennessee, has offices and places of business in Miami, Tampa, and Ft. Lauderdale, Florida, and is engaged in providing weather observation services pursuant to its contract with the FAA. During the past twelve (12) months, in conducting its business operations, the Employer derived gross revenues in excess of $500,000 and during that same time period, purchased services valued in excess of $50,000, which were furnished to the Employer at its Florida facilities, directly from points located outside the State of Florida.

[24] At the hearing, the parties stipulated that the Unions are labor organizations within the meaning of Section 2(5) of the Act. Although SEIU was not present at the hearing, the record reflects that SEIU is an organization in which employees participate and which exists for the purpose of dealing with employers concerning terms and conditions of employments, as required by Section 2(5) of the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Local 100-SEIU, AFL-CIO, Professional Air Traffic Controllers Organization, affiliated with NUHHCE, AFSCME, AFL-CIO, or neither. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that began less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type and clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, 201 E. Kennedy Blvd., Suite 530, Tampa, Florida 33602, on or before October 17, 2003. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (813) 228-2874. Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contract the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of

three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. This request must be received by the Board in Washington by 5:00 p.m., EST on October 24, 2003. The request may not be filed by facsimile.

DATED at Tampa, Florida, this 10th day of October, 2003

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Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, FL 33602-5824

Classification Index

316-6725
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347-4020-6725
177-8520-9200
177-8560-0100
177-8560-1500